Supreme Court, U.S.
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In the Supreme Court

of the

United States

OCTOBER TERM, 1994

RUSSELL HAMPSHIRE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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29 pp

QUESTIONS PRESENTED

1. Whether Petitioner was denied Fifth Amendment Due Process by the circuit's assertion that he waived his sentencing claims by not objecting at time of sentencing when the record shows incorporation of Petitioner's written objections and, a fortiori, the court's presentence ex parte letter to the Attorney General regarding the case manifests the district court's bias?

2. Whether the district court was without jurisdiction under the Sentencing Guidelines to impose a fine for costs of incarceration absent the imposition of a punitive fine in the first instance?

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Petitioner, Russell Hampshire, respectfully prays that a Writ of Certiorari issue to review the per curiam opinion of the United States Court of Appeals for the Eleventh Circuit filed February 4, 1994 affirming the judgment of the United States District Court for the Southern District of Alabama which dismissed the indictment against petitioner based upon outrageous prosecutorial misconduct.

OPINIONS BELOW

The citation of the opinion of which review is sought is United States v. Russell Hampshire. Eleventh Circuit, February 4, 1994) (#92-6048). Rehearing with suggestion en banc was denied April 6, 1994.

JURISDICTION

Petitioner invokes the jurisdiction of this court under 28 U.S.C. §1254(1).

The United States Court of Appeals entered its decision upon denial of a petition for rehearing on April 6, 1994.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution states in part: "No person shall...be deprived of life, liberty, or property, without due process of law...."

STATEMENT OF THE CASE

On September 19, 1991, a five-count indictment was filed in the United States District Court for the Southern District of Alabama charging Petitioner Hampshire, VCA Labs,

Inc., Nolan Quan and Don Diekmann with violations of 18 U.S.C. §§371, 1462 and 1467 for conspiracy to cause and knowingly causing interstate transportation through use of a common carrier of a number of videotapes alleged to be obscene.

On April 8, 1992, Hampshire and defendant VCA Labs, Inc. entered into a Plea Agreement pursuant to Federal Rule of Criminal Procedure 11(e)(1)(c) that, among other things, called for Hampshire to plead guilty to Counts Two and Three of the Indictment, to cooperate fully with the government and testify before a federal grand jury and upon doing so the government would recommend a sentence of no more than twelve months (although counsel could ask for a lower sentence).

The Plea Agreement further specified, "the parties agree that it is the intent for the cumulative forfeiture amount to be two million dollars with no fine. This agreement shall be

invalid if the agreed terms are not adopted by all the district courts and the parties will be permitted to withdraw all pleas previously entered." CR Vol. 2, Doc. 60.

On April 8, 1992 the Court in chambers took Petitioner Hampshire's guilty plea based on the Plea Agreement. In doing so the court stated, "I want Mr. Hampshire to understand that this agreement is being made under the terms of this plea agreement that will be introduced at this time." CR Vol. 6, at 4. During this proceeding no mention was made of the possibility of a sentence involving supervised release.

Prior to imposing sentence and after being informed that Petitioner Hampshire had rendered substantial assistance to the government, Judge Vollmer advised the parties in camera that he had agreed to be bound by the plea agreement. RE Doc 3 at 3.

Bias on the part of the Court can be inferred from its in camera comments. When

Petitioner's counsel informed the Court that under the plea agreement he would be bringing up in court other factors to seek a period of incarceration of less than twelve months, the Court declared, "Let me say this in chambers so that you're aware of what my retort will be to you." RE Doc. 3 at 4. The Court then proceeded to express its disappointment with the United States' Attorney's office for settling the case, advised that in drug cases he had sentenced someone to "ten years, for being the girlfriend of someone who distributed cocaine," and retorted that his personal feeling was "the production of obscene material is as bad as the production of cocaine" and that he had "a very bad attitude toward it (obscene material)." RE Doc. 3 at 5.

Additional evidence of the Court's bias can be gleaned from its further statement:

> What I'm calling to your attention, sir, is that if you say it outside, I'm going to make some of

these remarks probably. It may be that you can appeal the sentence as a result of these remarks and I'm suggesting you could probably have that right here.

I will accept what the Government has recommended. I will tell all of you that as a matter of fact, I wrote the attorney general a letter concerning the fact that I did this and I was sad that I did it, that I would never do it again. And I will tell Mr. Moore, and I think I may have already told Mr. Moore, that I would never approve a settlement like this again. The reason for it is as I just expressed to you. RE Doc. 3 at 6. (emphasis added.)

Upon resumption of sentencing proceedings in open court, Petitioner's counsel made a brief statement regarding downward departure and then submitted on the basis of the sentencing

pleading. CR Vol. 8, at 30. Thereafter the Court sentenced Petitioner Hampshire to custody for twelve months, the maximum sentence authorized by the Plea Agreement. CR Vol. 8, at 34. The Court also placed Petitioner on supervised release for a period of three years (the maximum allowed) and imposed costs of incarceration and supervision totaling $22,054.80. CR Vol. 8, at 34-36.

After imposing sentence the Court stated that any objections to the sentence should be stated or they would be waived on appeal. However, the Court observed that all previous objections would be renewed. Petitioner objected to the Court not considering reducing the incarceration period below twelve months.

On September 11, 1992, the Honorable Richard Vollmer, Jr. sentenced Petitioner Hampshire to the custody of the Attorney General for a period of twelve months, imposed a three year period of supervised release and ordered

Hampshire to pay $22,054.80 for costs of incarceration.

On September 17, 1992, Hampshire filed a timely notice of appeal. CR Vol. 2, Doc. 74. On February 4, 1994, the Eleventh Circuit affirmed the sentence imposed on the basis that objections thereto had been waived. On April 6, 1994 a petition for rehearing was denied.

SUMMARY OF ARGUMENT

The Circuit's decision refused to recognize or even discuss the fact that the trial judge wrote the Attorney General a letter about the case prior to sentencing Hampshire. It is unquestionable that the very act of writing such a letter reflects bias on the part of the trial court. Moreover, when asked to produce the letter both the Attorney General and the court stonewalled Hampshire. (See, for example, Petitioner's letter of September 28, 1992 to Attorney General Barr which is Exhibit 7 to

Petitioner's Emergency Motion for Bail on Appeal directed to the Eleventh Circuit). Clearly, a conspiracy of silence existed between the district court and the prosecution.

The actions of the district court bear witness to this conspiracy to deprive Hampshire of the benefits of his plea bargain. This the court did by imposing on Petitioner conditions of supervised release and payment of costs of incarceration. Neither of these conditions was mentioned in the Plea Agreement, nor were they discussed at the time the plea was taken by the court.

The court obviously understood the Plea Agreement and its terms, but decided to attempt to get around them. This is despite the fact the court said it would be bound by the Plea Agreement. CR Vol. 7 at 18. With respect to the portion of the sentence imposing a fine on Petitioner Hampshire for costs of incarceration, the court initially stated it was a fine then

tried to hide it by calling it a "cost". CR Vol. 8 at 36. The Court said also "(n)o fine is imposed pursuant to the Plea Agreement which specifies forfeiture in the amount of $2 million by VCA labs". CR Vol. 8 at 37. Thus, the district court knew it could not fine Hampshire under the Plea Agreement and tried to sidestep the issue by denominating the "fine" as a "cost". The court's action thus manifests its bias.

Initially, Petitioner had asked the court to depart from the 12 month recommendation and submitted on what had been submitted before. Then the court considered the matter in chambers and revealed its bias saying "I wrote the Attorney General a letter concerning the fact that I did this, I was sad that I did it, and that I would never do it again." ER Doc. 3 at 6. The court also told Hampshire's counsel "what I'm calling to your attention, sir, is that if you say it outside, I'm going to make

some of these remarks probably. It may be that you can appeal this sentence as a result of these remarks and I'm suggesting you probably have that right here." Id. Obviously, the intent of the court was to intimidate and silence counsel.

Later, back in the courtroom, the court after imposing sentence told counsel for Petitioner "I, of course, will give you all objections that you have made already, Mr. Mayock, but if you have anything further you can make these at this time.

Mr. Mayock: I suppose for the record I should say that I object to the court not considering reducing incarceration to a lesser period than twelve months." CR Vol. 8 at 41. Counsel for Petitioner thus reiterated his earlier statement knowing that the court understood the terms of the Plea Agreement and knowing that his sentencing memorandum contained the limits on which the sentence could be based

as a Rule 11 plea. Clearly, anything counsel said would have been futile at that moment. Petitioner wanted to get whatever benefit he could of the sentence he had bargained for. It is a miscarriage of justice to bar Petitioner from the benefits of his plea agreement because he sought to preserve what little he had received rather than risk losing everything by rightfully accusing the judge of bias and judicial misconduct.

There was no waiver on the part of Petitioner Hampshire by not immediately opposing the sentence. Prior to imposition of sentence Hampshire's counsel asked "that the court depart down from the 12 month recommendation and I submit on what has been submitted before". CR Vol. 8 at 33. After the sentence was later imposed Petitioner preserved his claim since the court specifically stated, "I, of course, will give you all objections that you have made already, Mr. Mayock, but if you have anything

further you can make those at this time." CR Vol. 8 at 45. Since earlier in the proceedings, Petitioner's counsel had referenced his Memorandum of Points and Authorities with respect to Sentencing Factors, the Points contained therein must be deemed to have been made. They are as follows:

"With respect to the Plea Agreement, it is understood that this plea was entered pursuant to Federal Rule of Criminal Procedure 11(e)(1)(c) and that there is to be no fine for the defendant only a cumulative fine of $2 million for the corporation, VCA Labs, Inc. Moreover, the guidelines are affected by the Plea Agreement since the plea is for a maximum one year term with a downward departure possibly being recommended below that time by the government and with the defense being allowed to ask for an even greater downward departure (See Paragraph 12 of the Plea Agreement). Moreover, the Plea Agreement makes clear that the plea is

null and void if the agreed terms are not adopted by the District Court. (Emphasis added.) Doc. 67 at 7.

Those familiar with the plea agreement could not in good faith twist and contort its meaning to possibly include imposition of a fine or supervised release. Assistant United States Attorney Moore stated at the time of the plea only that "(t)he defendant (Hampshire) will be jointly and separately liable with the corporation for the forfeiture of the $2 million that has been previously mentioned". CR Vol. 7 at 16.

Despite the fact that the Petitioner and the Government specifically agreed that the <u>total</u> amount of fine and forfeiture would not exceed two million dollars, and despite the fact that the District Court unequivocally told the parties he was accepting the plea agreement which provided for a two million dollar forfeiture, the Court proceeded to impose a

"fine" of $22,054.80 on Petitioner to cover the costs of incarceration. The District Court's action in this regard constitutes reversible error on three separate grounds. First, the imposition of this fine is violative of the plea agreement entered into by the Petitioner and the government. Secondly, the court had no jurisdiction to impose a cost of incarceration fine in the absence of first imposing a punitive fine. United States v. Norman, __F.2d____ (11th Cir. No. 91-3088, Sept. 30, 1993). And finally, the imposition of a fine to cover the costs of incarceration is unconstitutional denial of due process. United States v. Spiropoulos, 976 F.2d 155 (3d Cir. 1992).

REASONS FOR GRANTING THE WRIT

By claiming waiver with a stroke of the pen the Eleventh Circuit avoided the need to censure the district judge who denied Petitioner Fifth Amendment Due Process by contacting the Attorney

General in an ex parte letter before imposing the maximum sentence possible under the terms of a plea agreement. Indeed, the district court exceeded the terms of the plea agreement by imposing costs of imprisonment when such costs are not authorized under the Sentencing Guidelines in the absence of a punitive fine.

The issues presented here although not stemming from a published opinion, merit publication to set the limits on ex parte contact by the sentencing judge and to address the issue of imposition of costs of imprisonment as an unauthorized fine in the absence of a punitive fine.

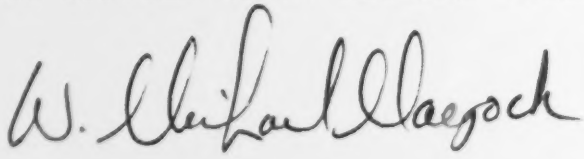
CONCLUSION

For the reasons cited above it is respectfully submitted that a Writ of Certiorari should issue to review the decision of the United States Court of Appeals for the Eleventh Circuit.

Dated: July 1, 1994.

Respectfully submitted,

LAW OFFICES OF W. MICHAEL MAYOCK



By: W. MICHAEL MAYOCK
Attorney for Petitioner,
Russell Hampshire

APPENDIX A

No. 92-6848

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

United States of America,
Plaintiff-Appellee,

v.

Russell Hampshire,
Defendant-Appellant.

D.C. No. CR 91-00200-RV

Appeal from the United States District court
for the Southern District of Alabama

February 4, 1994

Before: ANDERSON and BIRCH, Circuit Judges, and ATKINS*, Senior District Judge.

PER CURIAM:

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* Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

Although the district court gave appellant ample opportunity to object as required by the law of this circuit, defendant raised none of the challenges he now seeks to raise for the first time on appeal. Accordingly, appellants claims are waived and the judgment of the district court is

AFFIRMED.

APPENDIX B

No. 92-6848

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

United States of America,
Plaintiff-Appellee,

v.

Russell Hampshire,
Defendant-Appellant.

D.C. No. CR 91-00200-RV

Appeal from the United States District court
for the Southern District of Alabama

April 6, 1994

Before: ANDERSON and BIRCH, Circuit Judges, and ATKINS*, Senior District Judge.

PER CURIAM:

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* Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions(s) of Rehearing En Banc are

DENIED.